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TERMINATION BY DEATH OF PROPRIETARY POWERS OF ATTORNEY

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If we accept the conception of agency as a relationship in which one holds in trust for and subject to the control of another a power to affect certain legal relationships of that other, the distinction between pure agency relationships and other powers of attorney is very clear. The first can exist only where there is a fiduciary relationship and where the holder of the power has a primary obligation to the one who created it. So far as he acts for his own benefit in the exercise of the power, he is acting adversely and not as agent. It is true that agents usually act in order to benefit themselves but their privilege of benefiting themselves is limited to securing this benefit as a result of acting for the benefit of the principal.¹

Because of this fiduciary obligation and because the agent holds his power subject to the will of the principal, the power is revocable at any time by the principal in spite of any contract made by the latter that it shall not be, and, for the same reason, it terminates upon the death of the principal.

The power which may be called the proprietary power of attorney has only the common element of power. The holder is not a fiduciary, he does not hold at the will of the principal nor is he under obligation to the latter. To-day the two powers have so little in common that, were it not for their common origin and names, there would be no reason for confusion.²

Both powers sprang from the common-law conception of agency, as to which the evidence seems clear that the early law regarded the agent as the physical holder and reproducer of the principal's mind. This may be seen by an examination of the requirements.

Any human being could hold a power of agency, the individuality of the actor being entirely disregarded.³ The act to be performed had to

¹ For the discussion of this, see the article of which this is the continuation: *The Rationale of Agency* (1920) 29 YALE LAW JOURNAL, 859.

² The classification of these as "quasi-agency" powers can be justified only by the convenience of treating them in works upon agency. A full discussion is found in Mechem, *Agency* (2d ed. 1914) sec. 570.

³ Coke, *Littleton*, *52a.

be done in the principal's name. *Combes's Case*⁴ applied not only to formal engagements, but to all transactions: the agent for the purpose of the transaction must, as the *alter ego* of the principal, adopt the latter's name. For the same reason, we find one of the requirements of ratification, which was thought of as creating authority *a post*, to be that the act must have been done by one purporting to exercise authority for another.⁵ Likewise the law was clear that the agency must terminate at death.⁶ With the submergence of identities, this result was inevitable. And, finally, since the agent was thought to be one who was expressing, not his own will, but the will of another, the principal's assent to the transaction was at all times necessary. For this reason the primitive liability of a master for all the acts of his agent was modified by medieval logic to liability only for commanded acts.⁷ For the same general reason, the power of revocation existed at all times in the principal.

But this early conception of agency had changed by the nineteenth century, as the law had expanded beyond the old topic of master and servant. In pure agency, changes may be noted. First, the rise of the doctrine of undisclosed principal, and the extension of agency through trade, limited *Combes's Case* to specialties, and, in other cases, it was no longer necessary that the act should be done in the name of the principal.⁸ Secondly, the master became liable for uncommanded acts, provided they were within the scope of employment, the law no longer depending upon the identity of personalities, but creating obligations because the employer was the instigator of the series of acts.⁹ And finally, it has now become clear, by an analysis of the agency relationship, that, while it is still possible for one not *sui juris* to exercise an agency power, one not having capacity to assume fiduciary obligations can not be an agent in the true sense.

But the great departure from the first conception of agency was taken very early, when powers of attorney were utilized to create a power similar in name, for the benefit of the holder. The conception of the identity of principal and agent gave to English law an effective tool for

⁴ (1613, St. Cham.) 9 Co. Rep. 75 "It was resolved, that when anyone has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person."

⁵ *Keighley v. Durant* [1901, H. L.] A. C. 240.

⁶ "Livery of seizin may be made by the deputies or attornies of the parties. . . . But in the making of this care must be had. . . (5) That it be done in the life time of the parties." Shepard, *Touchstone* (1648) 217.

⁷ Wigmore, *Tortious Responsibility*, 3 *Select Essays Anglo-American Legal History* (1909) 474, 495.

⁸ Story, *Agency* (9th ed. 1882) sec. 154.

⁹ See cases collected in Wambaugh, *Cases on Agency* (1896) 79.

the prosecution of business which the Roman law never had. But this was entirely destroyed when the courts of the twelfth century, adopting the *mandatum in rem suam*, used the power of attorney as a means by which a personal claim could be transferred to another.¹⁰ To protect the interests of the power-holder, it was necessary to make the power irrevocable and at once there existed an *alter ego* not responding to the will of the creator, an unthinkable situation. There was a power of attorney in name, but not in fact.¹¹ The name was retained to avoid the rule as to the non-assignability of choses in action. When these powers were revived at the beginning of the eighteenth century, the courts, after some hesitation, recognized them as creating an independent interest in the power-holder, gave him an indefeasible privilege of suing in the name of the assignor, and made them non-terminable by the latter's death.¹² These powers were used mostly for the assignment of choses in action, but, in the eighteenth century, there arose a custom of creating them for the purpose of giving back to the mortgagees some of the control which the courts of equity had taken from them.¹³ These,

¹⁰ Ames, *The Disseisin of Chattels* (1890) 3 HARV. L. REV. 337, 340.

¹¹ Compare the following extracts: "An authority may be delegated by deed indented, though the attorney be not party to the deed, because the attorney takes nothing by the deed, but has only a naked authority delegated to him." Bacon, *Abridgment* (ed. 1842) tit. Authority (A). "Mere naked powers, which are to be exercised for the exclusive benefit of the grantor, are revocable by him. . . . But it is otherwise where a power is to be exercised in aid of a right vested in the grantee. . . . For it then sounds in contract, and is coupled with an interest." Story, J., in *Dartmouth College v. Woodward* (1819, U. S.) 4 Wheat. 518, 700. "The same principle applies in every case where a mandate is granted as a condition to the contract, or as a means of executing it. In such a case, the mandate, forming an element of a synallagmatic contract, is impressed with the qualities of such a contract, and is irrevocable." Fenner, J., in *Renshaw v. Creditors* (1888) 40 La. Ann. 37, 40, 3 So. 403, 405. "The power coupled with an interest thus referred to is, however, a power conferring proprietary rights which. . . is entirely distinct from a power of agency, and the reference is therefore confusing, rather than helpful." Tiffany, *Real Property* (1st ed. 1903) sec. 279. "And it may further still be said that, when reference is had to the nature of the *delectus personae* doctrine. . . that the grantor did not give the power to the corporation under the influence of the *delectus personae* doctrine, but that power so to appoint was purchased by the corporation as a part of the consideration named in the instrument, to be irrevocably exercised by it." Calhoun, J., in *Allen v. Alliance Trust Co.* (1904) 84 Miss. 319, 331, 36 So. 285, 287.

¹² *Crouch v. Martin* (1707, Ch.) 2 Vern. 595. Nor does the death of the assignee affect the assignment. *Hilliard v. Beattie* (1894) 67 N. H. 571, 39 Atl. 897. For a complete discussion of this see Cook, *Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816.

¹³ Jones, *Mortgages* (6th ed. 1904) sec. 1765. In some jurisdictions these powers were considered as powers operating under the statute of uses. Tiffany doubts the soundness of this view. *Real Property* (1920 ed.) sec. 656. If they are to be regarded as distinct powers, there seems to be no insuperable objection to considering them in this way. See Sugden, *Powers* (2d ed. 1845) *119.

together with all other powers given upon consideration or as security, were called powers coupled with an interest to differentiate them from simple agency powers.¹⁴ They were held to be irrevocable by the grantor and, after some doubt, the English courts held that all powers of this sort were not affected by his death.

The first case in the United States raising the question of the termination of such a power by the death of the grantor was that of *Bergen v. Bennett*¹⁵ in which Chancellor Kent held that a power of sale in a mortgage was a "power coupled with an interest" and was not affected by the death of the mortgagor. It was *Hunt v. Rousmanier's Administrators*,¹⁶ however, which proved to be the foundation of later American cases.

In this case Rousmanier had given to Hunt a power of attorney to sell vessels owned by Rousmanier, the power to be exercised upon default in the repayment of a loan for which the power was given as security. Upon a demurrer to a bill in equity, Marshall held that a power of attorney is a power to act as the substitute of another. Such substitute necessarily acts subject to the will and in the name of that other. Therefore, the normal power of attorney ceases whenever the creator wills and, since both the name and the will of a person ceases upon death, the power terminates upon the death of the creator. Powers given for consideration or as security may not be revoked by the creator, but, since the acts must be performed in his name, they necessarily cease upon his death. Powers, held by one who also holds a title or interest in the *res*, do not terminate upon the death of the creator. To come within this exception, the interest must be in the *res* itself and not in the proceeds.

¹⁴ "We think that it was not a simple authority to sell and surrender the premises, but an authority coupled with an interest; for *Forster* was to apply the proceeds in liquidation of a debt due to himself and partners." Lord Tenterden, in *Gausson v. Morton* (1830, K. B.) 10 Barn. & Cress. 731, 734. "What is meant by an authority coupled with an interest is this. . . .that where an agreement is being entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable." Williams, J., in *Clerk v. Laurie* (1857, Exch. Ch.) 2 Hurl. & Norm. 199, 200.

¹⁵ (1804, N. Y.) 1 Caines Cas. 1.

¹⁶ The case was first heard in the circuit court before Story, J., *sub nom. Hunt v. Ennis* (1821, C. C. R. I.) 2 Mason, 244. Story here suggested an amendment to include a statement that a lien had been intended which by error had not been included in the formal instrument. A demurrer to the amended bill was sustained on the ground that a mistake of law had been made against which equity would not relieve. *Ibid.* 342. Story held that there being no "power coupled with an interest," the power terminated with the death of Rousmanier. Upon this he was sustained. (1823) 8 Wheat. 174. But the demurrer was overruled on the ground that equity might afford relief to correct the mistake as stated in the petition. An answer was substituted for the demurrer and Story again held for the respondent in (1823, C. C. R. I.) 3 Mason, 294, being sustained in (1828, U. S.) 1 Pet. 1.

A power to sell, given as security, but without a specific conveyance of an interest, does not create an interest in the *res*.

The case is remarkable for the almost unanimous acceptance of its reasoning by the American courts and for the avoidance of its effects by many of them. It has become a tradition and, because of the great names associated with it, will always be cited. But it has had far more good fortune than it deserves. The authorities relied on were far from conclusive; it has curious inconsistencies; and the result reached was unfortunate both because justice was not done in the particular situation and because it has caused great confusion.

The authorities cited were meagre. The statement of Coke and Littleton,¹⁷ that, where a deed of feoffment is given with a power of attorney to convey seisin, the power must be exercised during the lifetime of the grantor, represented the sixteenth-century idea of the identity of principal and agent with the necessary consequence that all powers of agency must be exercised in the name of the "principal." *Combes's* case had reference only to the normal agency and represented the same view-point. In *Shipman v. Thompson*,¹⁸ Fortescue, J., ruled that the power to collect, held by a steward, terminated with the death of the master, it not being "a power coupled with an interest." Here again was a simple agency power. In *Wynne v. Thomas*,¹⁹ it was held that in a common recovery, the death of the vouchee, before the return of the writ of summons, prevented the recovery. Willes, C. J., doubting the irrevocability of the power of attorney given by the vouchee, held, that, whether revocable or not, it did not permit the vouchee to be represented by attorney after her death. That a power of attorney is revoked at law was held also at Nisi Prius in a case not cited, i. e. *Watson v. King*,²⁰ where trover was allowed for the sale of a ship by a powerholder after the death of the owner. In neither of these cases was the question raised as to the continuance of the power "in equity," the means by which assignments were first made valid. In fact, authority was almost lacking and Wilde, C. J., was justified in saying later that "not much is to be found in the law books" upon it.²¹

As to Marshall's reasoning, there are several features which call for notice. First, that his conception of agency was medieval in that he considered the agent to be in essence an extended will of the principal. And although he spoke of irrevocable powers of attorney, he did not see that an *alter ego*, not responding to the will of the one represented,

¹⁷ Coke, *Littleton*, *52b.

¹⁸ (1738, C. P.) Willes, 103.

¹⁹ (1738, C. P.) Willes, 563.

²⁰ (1815, N. P.) 4 Camp. 272.

²¹ *Smart v. Sanders* (1848, C. P.) 5 C. B. 895, 916.

was as inconceivable as an agent acting after death of the principal. The central point in his argument was that the holder of the power could not act in the name of a person deceased, which is correct only if the identification theory is adopted.²²

Moreover Marshall apparently did not have a clear conception of the great difference between the power of attorney and the testamentary power, as to their operation.²³ He seemed to think that the survival of a testamentary power after the death of the donor was an exception to the rule that a power without an interest terminates at the donor's death. Of course it was not an exception, since, in powers drawing their effects from the Statute of Wills or the Statute of Uses, there never was such a rule.

Apparently because of this error, Marshall evolves the rule as to powers of attorney that "a power not coupled with an interest terminates with the death of the creator of the power." The familiar rule in regard to testamentary powers had reference to the death of the power-holder.²⁴ In England the phrase as applied to powers of attorney included such a proprietary power as existed in *Hunt v. Rousmanier* which Marshall stated not to be a power coupled with an interest. And in England the only square determination upon this, at the time of Marshall's decision, was that even powers coupled with an interest terminated upon the death of the power-giver.²⁵ There was, therefore, not a scintilla of authority for the creation of a distinction between irrevocable powers with an interest and those without an interest.

Finally, in defining what an interest was, Marshall was unfortunate in

²² A number of American cases give this as a reason why an assignment of a chose in action is not terminated by death while a power to collect without an assignment is said to be terminated. *Citizens State Bk. v. Tessman* (1913) 121 Minn. 34, 140 N. W. 178. Of course this is not correct since, long before the real party in interest could sue in his own name, assignments were unaffected by the death of the assignor.

²³ In *Hunt v. Rousmanier* (1823, U. S.) 8 Wheat. 174, 206, Marshall says that testamentary powers were held not terminated at the death of the donor because so intended and because the courts treated them as devises. In fact they continued because they operated as the designation of a use. A similar power granted *inter vivos* is not affected by the death of the donor. If his argument has any weight, it may be said that as to proprietary powers of attorney, if not made in contemplation of death, they, like contracts, are intended to be executed, death notwithstanding. A court should be as desirous of carrying out one's contracts as one's devises. Story did not make this error in differentiation (2 Mason, 244, 250), but the same confusion of thought is evident where cases dealing with the two kinds of powers are cited indiscriminately (31 Cyc. 1043, note 41) and where the court in dealing with testamentary powers cite *Hunt v. Rousmanier*, *supra*, as in *Dixon v. Dixon* (1911) 85 Kan. 379, 116 Pac. 886.

²⁴ *Robinson v. Allison* (1883) 74 Ala. 254; *Osgood v. Franklin* (1816, N. Y.) 2 John. Ch. 1; Sugden, *op. cit.* *222.

²⁵ *Watson v. King*, *supra* note 20.

his expressions, as a majority of courts since have appeared to be in doubt as to his meaning.²⁶ He states at page 204:

"The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. . . . If the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name."

This seems to indicate that the power-holder must have a legal title, and it has been so understood by some courts and text writers.²⁷ But, if one has a legal title, giving him in addition a power of sale does not assist him at law, since he has already attached to his title a complete power of disposition.²⁸ If Marshall meant that the effect of this specifically-granted power was to allow a court of equity to bar the equity of redemption, it might well be asked why a court of equity might not equally well direct a sale for the benefit of the one holding the equitable interest. If Marshall meant to include in his word "interest," equitable interests, as has been generally thought,²⁹ the question arises whether or not one who has an irrevocable power does not also have an interest.

²⁶ Thus in the following cases where the court was dealing with an agency power, it cited Marshall for proof that the phrase "power coupled with an interest" meant a contractual power similar to that which Marshall said was not a power coupled with an interest: *Taylor v. Burns* (1906) 203 U. S. 120, 27 Sup. Ct. 40; *Forrest v. Smith* (1919) 23 Ga. App. 290, 98 S. E. 224; *Attrill v. Patterson* (1881) 58 Md. 226; *Laux v. Hogl* (1912) 45 Mont. 445, 123 Pac. 949; *State v. McCafferty* (1909) 25 Okla. 2, 105 Pac. 992; *Schilling v. Moore* (1912) 34 Okla. 155, 125 Pac. 487; *McKellop v. Dewitts* (1914) 42 Okla. 220, 140 Pac. 1161; *Gulf, etc. Ry. v. Miller* (1899) 21 Tex. Civ. App. 609, 53 S. W. 709.

On the other hand, some courts have said by way of dictum that a power is revocable unless it can be exercised in the name of the power-holder: *Todd v. Superior Ct. of Calif.* (1919) 181 Calif. 406, 184 Pac. 684.

In cases where the court has been dealing with a contractual power, clearly not within Marshall's definition of a power with an interest, it has been held that the power was irrevocable on the theory that it was a power coupled with an interest: *Chapman v. Bates* (1900) 61 N. J. Eq. 658, 47 Atl. 638; *Cloe v. Rogers* (1912) 31 Okla. 255, 121 Pac. 201; *Bryan v. Ross* (1919, Tex. Civ. App.) 214 S. W. 524.

²⁷ *Citizens State Bk. v. Tessman* (1913) 121 Minn. 34, 140 N. W. 178; *Tiffany, op. cit.* sec. 318.

²⁸ "The power given by the principal is, under such circumstances, rather an assent or agreement that the agent may transfer the property vested in him, free from all equities of the principal, than strictly a power to transfer." *Cassiday v. McKenzie* (1842, Pa.) 4 Watts & Serg. 282, 285.

²⁹ *Seymour v. Free* (1868, U. S.) 8 Wall. 202; *Bonner v. Cross County Rice Co.* (1914) 113 Ark. 54, 167 S. W. 80; *Chapman v. Bates* (1900) 61 N. J. Eq. 658, 47 Atl. 638. Some of the courts make a distinction as to real property, holding that as to it, the power must be such that the holder can act in his own name in the transfer. *Frink v. Roe* (1886) 70 Calif. 296, 11 Pac. 820; *Dick v. Page* (1852) 17 Mo. 234 (where the act of the power-holder is a link in the chain of title).

Before considering this, however, Marshall's distinction between an interest in the property and an interest in its proceeds, merits attention, if for no other reason than that many subsequent cases have seemingly turned upon the question: "Does the power-holder have an interest in the property itself, or is his interest limited merely to the proceeds?" The distinction is valuable as determining whether one is being paid for acting as agent.³⁰ Moreover an interest in property may be very different from an interest in the proceeds, in certain cases. For instance, where one agrees to hold the proceeds of realty, when sold, on trust, the interest in the proceeds can be distinguished from an interest in the land and such trust does not come within the Statute of Frauds.³¹ But, where there is not only an interest in the proceeds, but also an irrevocable power of sale so that proceeds shall be assured, to say that there is not an interest in the thing itself is to make a distinction of no practical value.

In fact *Hunt v. Rousmanier* represents a bit of formalism by a court which did not wish to press the logic of its reasoning to the fullest extent.³² The older theory of a power of attorney had been outgrown; the newer one was too revolutionary to be accepted in its entirety. The following reasons may be suggested for allowing proprietary powers to exist after the death of the creator, at least so that the holders should be able to derive a beneficial interest in the property over which the power is held.

1. The intent of the parties is that they shall continue to exist, and only in cases where there is some ground of public policy would the intent of the parties be defeated. Aside from a few cases dealing with powers of sale in a mortgage,³³ there is nothing to indicate a hostility to these powers by the courts.

2. There is no element involving personal relationship and only the formal reasoning that the power can not be executed in the name of the grantor is advanced. This same reason applies in the case of contracts, for it takes legal interpretation to enforce against the administrator of X a contract made by X. The reason for the termination of the original agency power is clear; when the reason is absent, as here, the rule should change. The question arises only in the case of the insolvency of the power-giver, and, as the courts hold that the power does not termi-

³⁰ Thus in *Blackstone v. Buttermore* (1866) 53 Pa. 266; *Jacksonville Terminal Co. v. Smith* (1914) 67 Fla. 10, 64 So. 354.

³¹ *Mohn v. Mohn* (1887) 112 Ind. 285, 13 N. E. 859.

³² "The whole reasoning of the court. . . shows their anxiety to rid themselves of the absurdity into which a strict adherence to the principle that death is a revocation of the power, would have lead them." Rogers, J., in *Cassiday v. McKenzie*, *supra* note 28 at p. 285.

³³ As in *Lockett v. Hill* (1874, C. C. N. D. Ga.) 1 Woods, 552.

nate by his bankruptcy, there is no substantial reason why the power should terminate upon his death.

3. But admitting that the power will terminate as a matter of law, the question still remains as to whether it should not be kept alive "in equity," not for the purpose of correcting a mistake of law, but because equity should recognize that the holder of the power has a real interest in the property and not a mere personal right.

The distinction between personal rights and property interests lies chiefly in the transferability of the latter. Personal rights are non-transferable, do not pass to an assignee in bankruptcy, and terminate at death. On the other hand, the possessor of a property interest may create in another an interest similar to that which he holds, it passes upon his bankruptcy, and, save in the case of estates for life, it passes to another upon his death. Where none of these incidents exist, we may be sure that there is not a property interest. Thus the licensee³⁴ or the holder of a common-law lien³⁵ was said to have merely a personal right. In some of the cases we are on the border-land. Thus the right to enter for condition broken and the possibility of reverter could descend but could not be transferred.³⁶ The right of an heir expectant can be transferred "in equity" but does not pass upon bankruptcy.³⁷ A contingent remainder is not an estate but the holder has an interest which he may transfer and which may pass upon his bankruptcy.³⁸

The law has been very slow in the creation of property interests, but there has been the same evolution, which Maine noticed in the change from status to contract, in the change from personal rights to property interests. Thus grants and leases of lands under the feudal system created originally purely personal relationships.³⁹ All choses in action were personal relationships and many of them are still non-transferable.⁴⁰ Equitable rights, beginning as inhibitions placed upon personal action, continued to be thought of as rights *in personam* and it is

³⁴ *Thomas v. Sorrell* (1673, C. P.) Vaughan, 330. It has been suggested that there is an analogy between a license and a proprietary power as both are said to terminate with death, even when paid for. But the analogy is far from perfect since a license is revocable at will while contractual powers admittedly are not.

³⁵ "A lien is a personal right, and cannot be transferred to another." Buller, J., in *Daubigny v. Duval* (1794, K. B.) 5 T. R. 604, 606.

³⁶ *Rice v. Boston & Worcester Ry.* (1866, Mass.) 12 Allen, 141.

³⁷ Bacon, *Abridgment* (ed. 1842) tit. Bankrupt, F; *Industrial Finance Syndicate v. Lind* [1915, C. A.] 2 Ch. 345; *Stover v. Eycleshimer* (1865, N. Y.) 46 Barb. 84.

³⁸ *Higden v. Williamson* (1731, Ch.) 3 P. Wms. 132; *Clowe v. Seavey* (1913) 208 N. Y. 496, 102 N. E. 521; *Martin v. Maxwell* (1910) 86 S. C. 1, 67 S. E. 962.

³⁹ See Hargrave's Note to Coke, *Littleton*, *64a.

⁴⁰ Holdworth, *History of the Treatment of Choses in Action* (1920) 33 HARV. L. REV. 997; Gray, *Restraints on Alienation* (2d. ed. 1895) sec. 3. See also 44 L. R. A. 177, note.

only recently that the courts have acted on the hypothesis that the *cestui* has an interest in the property itself. So a lien holder, at first having a mere personal right of detention, has almost everywhere today, either by statute or decision, an interest in the property commensurate with the debt for which he holds the lien.⁴¹

Perhaps the closest analogy to the proprietary power of attorney is the general power operating under the statute of uses or the statute of wills. Originally conceived as merely a power of direction of the donor's will, it was thought to be only a personal capacity, capable of being exercised by any one capable of doing the required act.⁴² The owner in fee of property, subject to the power, exhausted the whole interest so that it was impossible for anyone else to have an interest. But this logic, sufficient to overcome the difficulties of conveyancing, has not been convincing in an age of commercialism which can not be altogether convinced that the conjurer who produces rabbits from a hat did not have in advance something more than a capacity for making rabbits. Thus while the courts have been repeating that this power is merely a capacity, we find them gradually recognizing in the power-holder an interest in the property. Thus the donee is recognized as the *dominus* and a trustee appointed by him may take possession from the trustee appointed by the donor.⁴³ So where the holder of a power appoints by will to one deceased, the resulting trust goes to the heirs of the appointer.⁴⁴ In the bankruptcy cases the courts have held, not only, that if the donee exercised the power after bankruptcy, the assignee might take the proceeds of the power,⁴⁵ but also that the property may be taken from a volunteer in whose favor the power had been exercised.⁴⁶ To compel the power-holder to exercise the power in favor of his creditors or to allow the courts to do this, as is done by modern statutes,⁴⁷ is but a step further, and his complete interest is clear.⁴⁸ A

⁴¹ *Nash v. Mosher* (1838, N. Y.) 19 Wend. 431. Warren, *Cases on Property* (1919) 303 and cases cited.

⁴² Married women: *Peacock v. Monk* (1750, Ch.) 2 Ves. Sen. 190. Infants: *Re Cardross's Settlement* (1878) L. R. 7 Ch. Div. 728. The courts have recognized, however, the inconsistency of giving to one not *sui juris* complete disposition over property. See Lord Hardwick in *Hearle v. Greenbank* (1749, Ch.) 1 Ves. Sen. 298.

⁴³ *Onslow v. Wallis* (1849, Ch.) 1 Mac. & Gord. 506.

⁴⁴ *In re Van Hagan* (1880, C. A.) L. R. 16 Ch. Div. 18.

⁴⁵ *In re Harvey's Estate* (1879) L. R. 13 Ch. Div. 216; *Fleming v. Buchanan* (1853, Ch.) 3 De G. M. & G. 976.

⁴⁶ See L. R. A. 1918 D, 346, note. For the English cases see: *O'Grady v. Wilmot* [1916, H. L.] 2 A. C. 231; *In Re Wolstenholme* (1881, Ch.) 43 L. T. R. (N. S.) 752.

⁴⁷ (1845) 7 & 8 Vict. c. 96, sec. 11; U. S. Comp. Sts. (1916) sec. 9654.

⁴⁸ "The later Roman Jurisprudence, like our own, looked upon uncontrolled power over property as equivalent to ownership," Maine, *Ancient Law* (Pollock's ed.

similar situation arises upon insurance policies where the insured has a complete power of disposition as to the beneficiary, and, here, the courts recognize his property interest in it, which passes upon bankruptcy.⁴⁹

In the same way the courts can hardly fail to recognize that the holder of a proprietary power of attorney, irrevocable and not terminating by the bankruptcy of its creator, has an interest in the property. It is certainly not true that the title-holder, who from day to day holds his title subject to the will of the power-holder, has all the interest. It is not different in principle from the case where one, having made a contract for the sale of real property, holds the legal title subject to the will of the other contracting party. In both cases the contract should be enforced in equity, irrespective of death, in the one case by giving specific performance, in the other, by allowing the property to be sold under the power in the name of the administrator. It is similar to the cases giving specific performance on a promise to mortgage or assign a debt where the money has been advanced and bankruptcy intervenes.⁵⁰

1906) 251, cited by Hogg, *Why not Restate the English Law of Ownership of Land* (1921) 30 YALE LAW JOURNAL, 581. "A power equivalent to property," James, L. J., in *re Van Hagan*, *supra* note 44 at p. 33. "Considering that a general power is for almost all purposes equivalent to property. . . ." Jessel, M. R., in *re Van Hagan*, *supra*, at p. 32. "Giving one a general power is in fact giving her an interest," *Phipson v. Turner* (1838, Ch.) 9 Sims. 227, 250. "The very power to dispose of the remainder. . . . was practically equivalent to an interest," *Dixon v. Dixon* (1911) 85 Kan. 379, 387, 116 Pac. 886, 889.

This power terminates with the death of the power-holder necessarily since the exercise of his personal will, where there is no trust, is a condition, and in this way it is different from proprietary powers of attorney, which have nothing personal.

* "Under such conditions to hold that there was nothing of property to vest in the trustee would be to make an insurance policy a shelter for valuable assets. . . ." McKenna, J., in *Cohen v. Samuels* (1917) 245 U. S. 50, 53, 38 Sup. Ct. 36, 37.

⁵⁰ An agreement to sell a debt is a good assignment "in equity". *Heath v. Hall* (1812, C. P.) 4 Taunt. 326. An agreement to give a chattel mortgage is given effect after bankruptcy. *Triebert v. Burgess* (1857) 11 Md. 452. The mortgage of future-acquired goods operates as a contract giving the mortgagee power to acquire title. If, before the goods come into existence the mortgagor becomes bankrupt, as the mortgagee has not yet acquired an interest in the goods and as the contract is terminated by bankruptcy, the mortgagee is not, of course, protected. *Collyer v. Isaacs* (1881, C. A.) L. R. 19 Ch. Div. 342.

In the case of the proprietary power there is an implied agreement that the power shall remain. Thus, where the court was dealing with authority to fill in a negotiable note: "It is not by an authority, but by a contract between the acceptor and the intended drawer, that the drawer had a right to fill up the instrument. . . . You may call such a right an authority, but it is a right founded on a contract, and being a contract it does not come to an end by the death of the acceptor." Fry, L. J., in *Carter v. White* (1883, C. A.) L. R. 25 Ch. Div. 666. "We all know that the power of attorney, forming part of a security upon the assignment of a chose in action, is not revocable by the grantor. . . . For it then sounds

It is within the rule laid down by White, J., in *Walker v. Brown*,⁵¹

"Every express executory agreement, whereby the contracting party sufficiently indicates an intent to make some particular property, . . . or fund therein. . . identified, a security for debt, . . . or whereby the party promises. . . to transfer the property as security, creates an equitable lien. . . ."

To this we may add the words of Haughton, J., in *King v. Hanger*,⁵² in holding that the goods of a man deceased were entitled to his personal exemption from taxation; "the act of God shall not turn any man to a prejudice."

That the courts have seen the equity of the situation and have attempted to avoid the consequences of Marshall's opinion is seen by an analysis of the cases. Some have definitely cast away the distinction made between irrevocable powers and powers coupled with an interest. Where the distinction has been maintained, it has been chiefly in the case of real property. Most of the cases citing *Hunt v. Rousmanier* are given below. There has been no attempt to cover all cases save those dealing with the termination of the power by death, since the rules in other cases are well-established.

First, the distinction between agency powers and proprietary powers.⁵³ The theory is simple but there are many cases close to the line. In a few cases, the courts have made obvious errors, having permitted the fact that the agent expended money in reliance upon the continuance of his power, to blind them to the fact that there was a fiduciary relationship with a primary obligation to subserve the interests of the principal.⁵⁴ But of course it is possible that even an agency agreement shall be intended by the parties to give to the agent an indefeasible interest in the property itself, making him a co-owner, so that thereafter

in contract." Story, J., in *Dartmouth College v. Woodward* (1819, U. S.) 4 Wheat. 518, 700. In *Hawley v. Smith* (1873) 45 Ind. 183, the court held that the contract remained but the power terminated, causing the estate of the deceased power-giver to respond in damages for the breach of the contract, a result, it is submitted, which cannot be justified.

⁵¹ (1897) 165 U. S. 654, 664, 17 Sup. Ct. 453, 457.

⁵² (1615, K. B.) 3 Buls. 1, 18. In the same case Coke, C. J., says "It follows then here in this case, that these wines are the goods of George Hanger, notwithstanding he be dead."

⁵³ For a full discussion of the cases dealing with the distinction between proprietary powers and agency powers see Mechem, *Agency* (2d ed. 1914) sec. 561, *et seq.* For a succinct statement of the English law see Bowstead, *Agency* (6th ed. 1919) art. 138.

⁵⁴ *Forrest v. Smith* (1919) 23 Ga. App. 290, 98 S. E. 224; *Cloe v. Rogers* (1912) 31 Okla. 255, 121 Pac. 201; *Gulf, etc. Ry. v. Miller* (1899) 21 Tex. Civ. App. 609, 53 S. W. 709.

he is working for his own interest and for that of the principal. An agreement to allow a percentage for collection may be such an agreement, if the evidence is sufficiently clear that the agent is to become a co-owner at once. Upon substantially similar facts the same courts have reached different results, as is inevitable where it is a question of fact.⁵⁵

If the agency relationship is found, of course, it is terminable at will, although there was an agreement that it should not be terminated,⁵⁶ or although the agent advanced money,⁵⁷ or although it was expressed to be not revocable.⁵⁸ Although the agent had possession of the goods and a lien, the power to act as agent is terminated in the same way,⁵⁹ although of course the lien is not affected.⁶⁰ Except for those held by virtue of the lien,⁶¹ all powers of the agent are terminated at the principal's death and the only right of the agent to recover should be in quasi-contract.⁶²

Where there is a proprietary power, i. e. where the power was given as security, or on a contract not of agency, for the benefit of the power-

⁵⁵ Thus in *Hawley v. Smith* (1873) 45 Ind. 183, an agency only was found; in *Hitchens v. Ricketts* (1861) 17 Ind. 625, an irrevocable power was found. In *Jefferies v. Mutual Life Ins. Co.* (1884) 110 U. S. 305, 4 Sup. Ct. 8, and in *Seymour v. Freer* (1868, U. S.) 8 Wall. 202, there was held to be an irrevocable power, while in *Missouri v. Walker* (1888) 125 U. S. 339, 8 Sup. Ct. 929 and in *Taylor v. Burns* (1906) 203 U. S. 120, 27 Sup. Ct. 40, there was found to be an agency. See also *Bonner v. Cross County Rice Co.* (1914) 113 Ark. 54, 167 S. W. 80.

⁵⁶ *Walker v. Denison* (1877) 86 Ill. 142; *McGregor v. Gardner* (1862) 14 Iowa, 326. But see *contra*, *Bonney v. Smith* (1856) 17 Ill. 531. Of course the agent can recover for breach of contract. *Durkee v. Gunn* (1889) 41 Kan. 496, 21 Pac. 637.

⁵⁷ *Smith v. Dare* (1899) 89 Md. 47, 42 Atl. 909; *Atlantic Coast Realty Co. v. Townsend* (1919) 124 Va. 490, 98 S. E. 684.

⁵⁸ *Todd v. Superior Court* (1919) 181 Calif. 406, 184 Pac. 684 (where the documents stated the power to be coupled with an interest); *McGregor v. Gardner* (1862) 14 Iowa, 326.

⁵⁹ *De Comas v. Prost* (1865, P. C.) 3 Moore (N. S.) 158; *Taplin v. Florence* (1851, C. P.) 10 C. B. 744; *Frith v. Frith* [1906, P. C.] A. C. 254; *Laux v. Hogl* (1912) 45 Mont. 445, 123 Pac. 949; *Marfield v. Goodhue* (1849) 3 N. Y. 62; *Atlantic Coast Line Realty Co. v. Townsend*, *supra* note 57.

⁶⁰ *Smart v. Sandars* (1848, C. P.) 5 C. B. 895; *Marfield v. Goodhue*, *supra* note 59.

⁶¹ The power of the agent to indemnify himself does not terminate. *Hess v. Rau* (1884) 95 N. Y. 359. Here the court held the agent had a power to continue to borrow shares, on a "short" transaction entered into for the principal.

⁶² *Fisher v. Southern, L., & T. Co.* (1905) 138 N. C. 90, 50 S. E. 592. But see *Mills v. Smith* (1906) 193 Mass. 11, 78 N. E. 765, holding that, where the agreement provided the agency should continue after death, the estate of the deceased principal was bound to re-employ.

holder or of a third person, it is not revocable by the will of the power-giver⁶³; nor is it affected by his bankruptcy,⁶⁴ or insanity.⁶⁵

At this point unanimity ceases. The courts are not at all clear, save in England, as to what constitutes a power coupled with an interest. As previously indicated, in many cases the American courts have used "power coupled with an interest" as meaning a contractual power.⁶⁶ When a square determination as to the termination of the power by death has been presented, there are a variety of holdings. Thus where a legal title to real estate is given to a power-holder, it is everywhere held that the title survives.⁶⁷ Where there is a legal lien upon real property,

⁶³ *Bromley v. Holland* (1802, Ch.) 7 Ves. 3 (to collect annuity); *Hodgson v. Anderson* (1825, K. B.) 3 Barn. & Cress. 842 (direction to banker to pay creditor); *Gausson v. Morton* (1830, K. B.) 10 Barn. & Cress. 731 (to sell land); *Clerk v. Laurie* (1857, Exch.) 2 Hurl. & Norm. 199 (direction to banker to pay creditor); *In re Hannan etc. Co.* [1896, C. A.] 2 Ch. 643 (to subscribe for shares); *Pacific Coast Co. v. Anderson* (1901, C. C. A. 9th) 107 Fed. 973 (said to be an equitable assignment); *Allen v. Davis* (1852) 13 Ark. 28 (to sell); *Marziou v. Pioche* (1857) 8 Calif. 522 (to sue, as security for debt); *Smith v. San Francisco & N. P. Ry.* (1897) 115 Calif. 584, 47 Pac. 582 (to vote); *Ray v. Hemphill* (1895) 97 Ga. 563, 25 S. E. 485; *Kindig v. March* (1860) 15 Ind. 248 (to confess judgment); *Bonney v. Smith* (1856) 17 Ill. 531 (to collect) *semble*; *Goodwin v. Bowden* (1867) 54 Me. 424 (direction to debtor to pay creditor); *American Loan & T. Co. v. Billings* (1894) 58 Minn. 187, 59 N. W. 998 (for benefit of creditors); *Pardoe v. Merritt* (1898) 75 Minn. 12, 77 N. W. 552 (to enter land on soldier's script); *Buffalo Land Co. v. Strong* (1903) 91 Minn. 84, 97 N. W. 575 (to convey land); *Laux v. Hogl* (1912) 45 Mont. 445, 123 Pac. 949 (to sell), *semble*; *Chapman v. Bates* (1900) 61 N. J. Eq. 658, 47 Atl. 638 (voting proxy and power to sell and exchange); *Hey v. Dolphin* (1895, Sup. Ct.) 92 Hun. 230, 36 N. Y. Supp. 627 (voting agreement); *Smyth v. Craig* (1841, Pa.) 3 Watts & Serg. 14 (agreement for arbitration as to price); *Gulf, etc. Ry. v. Miller* (1899) 21 Tex. Civ. App. 609, 53 S. W. 709 (to collect); *Montague v. McCarrol* (1897) 15 Utah, 318, 49 Pac. 418 (soldier's script); *Contra, Mansfield v. Mansfield* (1827) 6 Conn. 559.

⁶⁴ *Hutchinson v. Heyworth* (1838, Q. B.) 9 Ad. & El. 375 (power to collect); *Walker v. Rostron* (1842, Exch.) 9 M. & W. 411 (same); *Stover v. Eyclesheimer* (1865, N. Y.) 46 Barb. 84; *Wood v. Kerkeslager* (1909) 225 Pa. 296, 74 Atl. 174.

⁶⁵ *Powell v. Batchelor* (1915) 192 Mo. App. 67, 179 S. W. 751. See *Davis v. Lane* (1839) 10 N. H. 156.

⁶⁶ See *supra* note 26.

⁶⁷ *Hudgens v. Morrow* (1886) 47 Ark. 515, 2 S. W. 104; *More v. Calkins* (1892) 95 Calif. 435, 30 Pac. 583; *Benneson v. Savage* (1889) 131 Ill. 352, 22 N. E. 838; *Berry v. Skinner* (1869) 30 Md. 567; *Connors v. Holland* (1873) 113 Mass. 50; *Beatie v. Butler* (1855) 21 Mo. 313; *White v. Stephens* (1883) 77 Mo. 452; *Durbrow v. Eppens* (1900) 65 N. J. L. 10, 46 Atl. 582; *Carter v. Slocomb* (1898) 122 N. C. 475, 29 S. E. 720; *Wilburn v. Spofford* (1857, Tenn.) 4 Sneed, 698; *Hodges v. Gill* (1876, Tenn.) 9 Baxt. 378. *Contra*, as result of statute, *Texas Loan Agency v. Dingee* (1903) 33 Tex. Civ. App. 118, 75 S. W. 866.

So on the death of one of two title-holders, the power survives in the other.

it would seem that the existence of the lien should be held to create an interest and make the power non-terminable.⁶⁸ But some of the courts, finding that the power of sale can not be exercised in the name of the mortgagee, hold that the power terminates with the death of the mortgagor.⁶⁹ Where there is less than a lien, the courts have generally held that the power does not survive, upon the ground that the power can not be exercised in the name of a dead man.⁷⁰

Where a power of sale has been given in regard to chattels, it has been held that a transfer of possession causes the power not to terminate.⁷¹ Other cases have held that, even where possession has not been given, the power does not terminate.⁷²

In dealing with choses in action, it is everywhere held that, where an assignment has been made, a power of attorney, given at the same time, is not terminated by the death of the assignor.⁷³ Where the obligation

Gutman v. Buckler (1888) 69 Md. 7, 13 Atl. 635; *Striker v. Daly* (1918) 223 N. Y. 468, 119 N. E. 882.

⁶⁸ The power is not terminated. *Bergen v. Bennett* (1804, N. Y.) 1 Caines Cas. 1; *Frank v. Colonial & U. S. Mtg. Co.* (1905) 86 Miss. 103, 38 So. 340; *Muth v. Goddard* (1903) 28 Mont. 237, 72 Pac. 621; *Grandin v. Emmons* (1901) 10 N. D. 223, 86 N. W. 723; *Reilly v. Phillips* (1894) 4 S. D. 604, 57 N. W. 780 (where the sale is made and deed executed by the sheriff). See Jones, *Mortgages* (6th ed. 1904) sec. 1792.

⁶⁹ *Lockett v. Hill* (1874, C. C. N. D. Ga.) 1 Woods, 552; *Frink v. Roe* (1886) 70 Calif. 296, 11 Pac. 820, *semble*; *Wilkins v. McGehee* (1891) 86 Ga. 764, 13 S. E. 84, overruling *Colloway v. People's Bank* (1875) 54 Ga. 441, and *Roland v. Coleman* (1886) 76 Ga. 652; *Johnson v. Johnson* (1887) 27 S. C. 309, 3 S. E. 606.

⁷⁰ The power terminates *Garland v. Dunn* (1851) 11 Ark. 720; *Frink v. Roe*, *supra* note 69, *semble*; *McGriff v. Porter* (1853) 5 Fla. 373; *Jeffersonville Assoc. v. Fisher* (1856) 7 Ind. 699, *semble*; *Bonney v. Smith* (1856) 17 Ill. 531, *semble*; *Attrill v. Patterson* (1881) 58 Md. 226, *semble*; *Dick v. Page* (1852) 17 Mo. 234, *semble* (the Missouri rule is explicitly limited to real property); *Davis v. Lane* (1839) 10 N. H. 156, *semble*; *Wilburn v. Spofford*, *supra* note 67, *semble*; *Hustin v. Cantril* (1840, Va.) 11 Leigh, 136, (based upon a misunderstanding of *Clayton v. Fawcett Adm'rs.* (1830, Va.) 2 Leigh, 19).

The power does not terminate, *Spooner v. Sandilands* (1842, Ch.) 1 Y & Col. 390; *Bonner v. Cross County Rice Co.* (1914) 113 Ark. 54, 167 S. W. 80. See also *Glendening v. W. U. T. Co.* (1914) 163 App. Div. 489, 148 N. Y. Supp. 552.

⁷¹ *Merry v. Lynch* (1879) 68 Me. 94. This is in conformity to the rule in testamentary powers that one having possession has sufficient interest to satisfy the rule of survivorship. *Eyre v. Countess of Shaftsbury* (1722, Ch.) 2 P. Wms. 103.

⁷² *Gurnnell v. Gardner* (1863, Ch.) 4 Giff. 626; *American Loan & Tr. Co. v. Billings* (1894) 58 Minn. 187, 59 N. W. 998, *semble*.

⁷³ Negotiable paper, *Carter v. White* (1883, C. A.) L. R. 25 Ch. Div. 666; *Moore v. Hall* (1882) 48 Mich. 143, 11 N. W. 844; *Citizens' State Bk. v. Tessman* (1913) 121 Minn. 34, 140 N. W. 178. Other obligations, *Tucker v. Wilson* (1714, Ch.) 1 P. Wms. 261; *Norton v. Whitehead* (1890) 84 Calif. 263, 24 Pac. 154; *Kelly v. Bowerman* (1897) 113 Mich. 446, 71 N. W. 836; *Hilliard v. Beattie* (1894) 67 N. H. 571, 39 Atl. 897.

is represented by a document and the possession of the document is transferred, the same result is reached.⁷⁴ Where a power is given without either an assignment or a change in the possession of a document, there is some conflict, but the tendency is to hold that the power is not terminated.⁷⁵

⁷⁴ *United States v. Cutts* (1832, C. C. D. N. H.) 1 Sumn. 133; *Renshaw v. Creditors* (1888) 40 La. Ann. 37, 3 So. 403; *Merry v. Lynch* (1878) 68 Me. 94; *Leavitt v. Fisher* (1854, N. Y.) 4 Duer, 1; *Fraser v. Charleston* (1878) 11 S. C. 486. See also *Dickinson v. Bank* (1880) 129 Mass. 279, holding that bankruptcy does not terminate the power.

⁷⁵ The power terminates. *Gardner v. First Nat. Bk.* (1890) 10 Mont. 149, 25 Pac. 29; *Houghtaling v. Marvin* (1849, N. Y.) 7 Barb. 412, *semble*. In *Leopard v. Vernon* (1813, Ch.) 2 Ves. & Bea. 51, the court apparently held to the same effect, where the interest of the power-holder was not allowed to be shown.

The power does not terminate. *Kiddill v. Farnell* (1857, Ch.) 3 Sm. & Giff. 428 (power to convey stock); *Hatch v. Searles* (1854, Ch.) 2 Sm. & Giff. 147, *semble*; *Carter v. White*, *supra* note 73, *semble*; *Jeffries v. Mutual Life Ins. Co.* (1884) 110 U. S. 305, 4 Sup. Ct. 8 (power to collect given by an administrator. The rule of Marshall would seem to be satisfied in this case since the name of the administrator could be used in the action); *Pacific Coast Co. v. Anderson* (1901, C. C. A. 9th) 107 Fed. 973 (given as security); *Shepard v. McNail* (1907) 122 Mo. App. 418, 99 S. W. 494; *Stevens v. Sessa* (1900) 50 App. Div. 547, 64 N. Y. Supp. 28; *Babrowsky v. U. S. G. L. of B. A.* (1908) 129 App. Div. 695, 113 N. Y. Supp. 1080; *Keys' Estate* (1890) 137 Pa. 565, 20 Atl. 710.

In the following cases as well as in most of the cases just cited, it was stated that the power created an equitable assignment, which is universally held not to terminate at the death of the assignor. *Hutchinson v. Heyworth* (1838, Q. B.) 9 Ad. & El. 375; *Farmers' Bk. v. Kansas City Pub. Co.* (1876, C. C. W. D. Mo.) 3 Dill. 287; *Raymond v. Squire* (1814, N. Y.) 11 John. 47; *Hurley v. Bendel* (1896) 67 Minn. 41, 69 N. W. 477. In *Cox v. Hughes* (1909) 10 Calif. App. 553, 102 Pac. 956, it was stated that the power was coupled with an interest.

In the following cases also the power was held not to terminate. *Durbrow v. Eppens* (1900) 65 N. J. L. 10, 46 Atl. 582 (power to manage a fund contributed by a number of subscribers); *Rogers v. Clark Iron Co.* (1908) 104 Minn. 198, 116 N. W. 739 (power to enter land); *Hennessee v. Johnson* (1896) 13 Tex. Civ. App. 530, 36 S. W. 774 (same).

In the case of a power to confess judgment it has been held that the power terminates with the death of the defendant (*Gee v. Lane* (1812, K. B.) 15 East, 592); although if the death occurs during the term, judgment may be entered as of the first day. *Fuller v. Jocelyn* (173, K. B.) 2 Str. 882. It has always been held that the power terminates with the death of the power-holder. *Cowie v. Allaway* (1799, K. B.) 8 T. R. 257; *Wild v. Sands* (1727, K. B.) 2 Str. 718. But where the power has been given to two, one of whom dies, it may be exercised by the survivor. *Todd v. Todd* (1753, K. B.) Barnes, 48; *Fendall v. May* (1813, K. B.) 2 M. & S. 76.